



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 19, 2004

Ms. Lisa Mims
General Counsel
Texas Board of Professional Geoscientists
333 Guadalupe, Suite 460A
Austin, Texas 78701

OR2004-7075

Dear Ms. Mims:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 207515.

The Texas Board of Professional Geoscientists (the "board") received the following request for information:

1. Please provide me with a copy of any emails between Ms. Lisa Mims and Chairman Kevin Coleman or Vice Chairman Ed Miller that:

- Reference sexual harassment in TBPG
- Reference TBPG office gossip
- That refer to the Executive Director Michael D. Hess
- That refer to Agency employees
- That seek policy answers from the Board where the Executive Director is not CC
- That reference being "afraid"

2. Also please provide me with any emails from Ms. Lisa Mims to state employees in other agencies that reference the above subjects.

You claim that the requested information is excepted from disclosure under sections 552.101, 552.107, and 552.108 of the Government Code.¹ We have considered your claims and reviewed the submitted representative sample of information.²

As a preliminary matter, we note that the present request was made by the board's executive director. The purpose of the Act is to prescribe conditions under which members of the general public can obtain information from a governmental body. *See* Attorney General Opinion JM-119 (1983) (statutory predecessor). An official of a governmental body who, in an official capacity, requests information held by the governmental body does not act as a member of the public in doing so. Thus, exceptions to public disclosure under the Act do not control the right of access of an official of a governmental body to information maintained by the governmental body. *See id.* at 3 (member of community college district board of trustees, acting in official capacity, has an inherent right of access to information maintained by district); *see also* Gov't Code §§ 552.201 (chief administrative officer of governmental body is officer for public information for governmental body), .204 (officer for public information is responsible for release of public information as required by Act). In the event the requestor is acting in his official capacity, therefore, we find the present request is not a request by a member of the public under the Act and we determine that the board may not withhold the submitted information from the executive director pursuant to the Act's exceptions to required public disclosure. *See* Attorney General Opinion JM-119 (1983). In the event, however, the requestor is making the present request in his personal capacity as a member of the public, we will address your claimed exceptions.

You contend the submitted information is protected by the attorney-client privilege encompassed by section 552.107 of the Government Code. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that

¹ You also raise sections 552.022 and 552.305 of the Government Code. Section 552.022 provides a list of eighteen categories of information that are expressly public and may not be withheld unless confidential under other law. Thus, section 552.022 is not an exception to disclosure under the Public Information Act (the "Act") and does not provide a basis for withholding information from disclosure. Similarly, section 552.305 is not an exception to disclosure under the Act, but rather a procedural provision permitting a governmental body to withhold information, the release of which may implicate third party interests, while the governmental body is seeking an attorney general's decision under the Act. Thus, section 552.305 also does not itself provide a basis for withholding information from required public disclosure under the Act. *See* Gov't Code § 552.301(a) (noting that exceptions to disclosure under Act are found at subchapter C of chapter 552 of Government Code).

² We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body.³ TEX. R. EVID. 503(b)(1). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives.⁴ TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body seeking to establish that a communication is protected by the attorney-client privilege must inform this office of the identity and capacity of each individual involved in the communication. Finally, the attorney-client privilege applies only to a communication that is confidential. *Id.* 503(b)(1). A confidential communication is a communication that was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets the definition of a confidential communication depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) of the Government Code generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You indicate that the submitted communications were made between board personnel and attorneys in the course of rendering professional legal services to the board. You also indicate that the communications were intended to be confidential, and that the confidentiality has been maintained. Based on your representations and our review, we find

³ The privilege does not apply when an attorney or representative is acting in a capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Because government attorneys often act in capacities other than that of professional legal counsel, including as administrators, investigators, or managers, the mere fact that a communication involves an attorney for the government does not demonstrate this element.

⁴ Specifically, the privilege applies only to confidential communications between the client or a representative of the client and the client’s lawyer or a representative of the lawyer; between the lawyer and the lawyer’s representative; by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein; between representatives of the client or between the client and a representative of the client; or among lawyers and their representatives representing the same client. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E); *see also id.* 503(a)(2), (a)(4) (defining “representative of the client,” “representative of the lawyer.”)

the board has established that most of the submitted information is protected by the attorney-client privilege with respect to disclosure to the general public. Accordingly, in the event the requestor is making the present request in his personal capacity as a member of the public, we determine the board may withhold the information we have marked pursuant to section 552.107 of the Government Code.⁵ We note, however, that the submitted information includes e-mails between the board and employees of the Texas Department of Public Safety ("DPS"). We find that these e-mails are not communications between the board and its attorneys or representatives for purposes of the attorney-client privilege and therefore may not be withheld pursuant to section 552.107.

We understand you to assert that the e-mails between the board and DPS are excepted under section 552.108 of the Government Code. Section 552.108(a) generally excepts information held by a law enforcement agency that deals with the detection, investigation, or prosecution of crime, if release of the information would interfere with the detection, investigation, or prosecution of crime. *See Gov't Code §§ 552.108(a)(1), (2)*. A governmental body that claims information is excepted from disclosure under section 552.108 must reasonably explain how and why section 552.108 is applicable to the information. *See Gov't Code §§ 552.108(a)(1), .301(e)(1)(A); see also Ex parte Pruitt, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986)*.

The board is not a law enforcement agency. *See Open Records Decision No. 199 (1978)* (agency whose function is essentially regulatory in nature is not "law enforcement agency" for purposes of statutory predecessor to section 552.108). By its terms, section 552.108 applies only to a law enforcement agency or a prosecutor. This office has determined, however, that where an incident involving alleged criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information that relates to the incident. *See Open Records Decision Nos. 474 (1987), 372 (1983)* (where incident involving allegedly criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information relating to incident). Where a non-law enforcement agency has custody of information relating to a pending case of a law enforcement agency, the agency having custody of the information may withhold the information under section 552.108 if the agency demonstrates that the information relates to the pending case and provides this office with a representation from the law enforcement entity that the law enforcement entity wishes to withhold the information. In this case, you have not demonstrated that the e-mails at issue relate to a pending criminal investigation or prosecution and you have not provided a representation from a law enforcement entity that wishes to withhold the e-mails from disclosure. We therefore determine that the e-mails between the board and DPS are not excepted from disclosure under section 552.108 of the Government Code.

⁵ As our finding under section 552.107 is dispositive under these circumstances, we do not reach your remaining exceptions to disclosure with respect to this information.

We also understand you to assert that the e-mails between the board and DPS are excepted from disclosure under section 552.101 of the Government Code in conjunction with state and federal law governing the disclosure of criminal history record information ("CHRI"). Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1). Section 411.083 of the Government Code provides that any CHRI maintained by the DPS is confidential. Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Section 411.082 of the Government Code defines CHRI as "information collected by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions." Gov't Code § 411.082(2). We note that the board is not a criminal justice agency, and that the e-mails at issue do not contain any information within the definition of CHRI. We therefore determine the board may not withhold the e-mails between the board and DPS pursuant to section 552.101 in conjunction with state and federal law governing CHRI.

Next, you contend that the e-mails between the board and DPS must be withheld in their entirety pursuant to the informer's privilege. The common-law informer's privilege, incorporated into the Act by section 552.101 of the Government Code, has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The informer's privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988). Upon review, we find you have failed to adequately demonstrate that the e-mails at issue consist of a report of a violation of law for purposes of the informer's privilege. Consequently, we find that the board has not established any portion of the e-mails between the board and DPS are protected by the informer's privilege. We therefore determine the board may not withhold these e-mails under section 552.101 on that basis.

In summary, in the event the requestor is making the present request in his official capacity as executive director of the board, we find the board may not withhold the submitted

information pursuant to the Act's exceptions to required public disclosure. In the event the requestor is making the present request in his private capacity as a member of the public, we find the board may withhold a portion of the submitted information, which we have marked, pursuant to section 552.107 of the Government Code as information protected from public disclosure by the attorney-client privilege. However, the board must release the remainder of the submitted information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within thirty calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within ten calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within ten calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within ten calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within ten calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Saldivar', with a long horizontal flourish extending to the right.

David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 207515

Enc: Submitted documents

c: Mr. Michael D. Hess
603 Oaklands Drive
Round Rock, Texas 78681
(w/o enclosures)